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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 265.

FEDERAL COMMUNICATIONS COMMISSION, Petitioner,

vs.

THE POTTSVILLE BROADCASTING COMPANY.

OPPOSITION OF THE POTTSVILLE BROADCASTING COMPANY TO PETITION FOR WRIT OF CERTIORARI.

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A.

THE FACTS AND THE ISSUE.

The real issue, stripped of all verbiage and particularities, is whether the "supremacy of law" shall be recognized in connection with decisions of the Federal Communications Commission—whether there shall be *any* judicial review, coupled with authority to enforce the conclusions resulting therefrom, of decisions of the Federal Communications Commission.[1]

The Pottsville Broadcasting Company on May 19, 1936, filed an application for a permit to construct a new radio broadcasting station in Pottsville, Pennsylvania. The Com-

[1] In his separate opinion in *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38, 84, Mr. Justice Brandeis said:

"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied, and whether the proceeding in which facts were adjudicated was conducted regularly."

mission designated the application for hearing to determine the legal, technical and financial qualifications of the applicant, the need for the station, etc. Six weeks thereafter and, under the Commission's own rules,[2] too late for a hearing at the same time, the Schuylkill Broadcasting Company filed an application for the same facilities and, through the medium of a petition to intervene, took part in the hearing.[3] Such hearing was held before an examiner and was for the sole purpose of determining the propriety of granting respondent's application, which was the *only one heard* at the time. The examiner recommended that it be granted. The Commission found that there was a need for the station and that the applicant was legally and technically qualified, but it reversed the examiner and denied the application for the reason that it considered that the applicant was not financially qualified because of what the court below termed an "incorrect supposition" as to the application of a law of the State of Pennsylvania. It also expressed the opinion, as a secondary reason for its action, that "local" stations should be controlled by persons who are familiar with the needs of the area to be served.

The Court of Appeals for the District of Columbia re-

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[2] Rule 106.4 (Sec. 12.21 of the new rules) provides that "In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for hearings on all related matters which involve the same applicant, or arise out of the same complaint or cause; and for hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature, *excepting, however, applications filed after any such application has been designated for hearing.*" (Emphasis supplied.)

[3] The fact that a party has been allowed to intervene and participate in a hearing has never been regarded by the Commission as any indication that the intervener has any right to a comparative or prior consideration of such application as it may have pending. This policy of the Commission has found expression in the new rules, Sec. 1.102 of which provides, in part: "The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same."

versed the Commission on the ground that, as a matter of law, it erred in holding that The Pottsville Broadcasting Company was not financially qualified. This error the Commission in effect conceded (R. 3). However, in remanding the case the court left open for further consideration by the Commission the sole question of whether the latter had adopted, or intended forthwith to adopt as a definite policy the disqualification of corporate applicants which may be controlled by nonresidents of the area to be served.

The Commission, without asking leave of the Court of Appeals to enlarge the record, and without any indication of an intention to announce any policy concerning the control of stations by nonresidents, scheduled the application of The Pottsville Broadcasting Company for consideration with two other applications, that of the aforementioned Schuylkill Broadcasting Company and that of the still more dilatory Pottsville News and Radio Corporation, the final decision to be based upon a *comparative* consideration. (R. 7, 8.)

In its decision (R. 24) on the petition filed by The Pottsvill Broadcasting Company for writs of prohibition and mandamus to prevent the comparative consideration proposed by the Commission and to compel consideration on the record as made, the court held (R. 29) that it was the duty of the Commission to comply with the order remanding the case and, "unless for some exceptional reason it obtains leave of this court to reopen the case, to reconsider the matter on the record and in the light of this court's opinion"; also, that The Pottsville Broadcasting Company "ought not to be required any more now than originally to be put in hodgepodge with later applicants whose records were not made at the time of the previous hearing."

The Commission, in its petition for a writ of certiorari

(p. 2), has recognized the question presented to be "whether the court below has power to issue a writ of mandamus to compel the Commission to reconsider petitioner's application on the original record and without regard to the subsequent applications." This statement may appear innocuous enough at first reading but, upon reflection and in the light of all the circumstances, it means nothing more or less than that the Commission proposes to have the "last word" *in any event*, and to nullify, even though it may not openly disregard, any order of the court which may be contrary to what the Commission thinks proper.

Fortunately, the Congress has specifically provided for a review of the Commission's decisions and has stated just what effect the judgment of the court shall have. Section 402 (e) of the Communications Act, which Section is set forth in full in the appendix to the Commission's Petition, provides that when the Court of Appeals enters an order reversing a decision of ths Commission "it shall remand the case to the Commission to carry out the judgment of the court", and that the court's judgment "shall be final", subject to review by the Supreme Court on writ of certiorari.

These specific provisions of the statute clearly show that the Commission not only has the duty of complying with the court's order but also that it has no other or additional right of action. The very basis for such further action as it may be free to take is the *record which was before the court*. Indeed, the statute (Sec. 402 (e)) requires the court to "hear and determine the appeal *upon the record before it*." Otherwise, the Commission would be enabled, in almost every conceivable case, to defeat the court's order by the simple expedient of considering the case on new issues, new parties, or both, and then deciding the case on grounds which were neither before the Com-

mission nor before the court in the first instance. It is just such a prospect which is effectively controlled and orderly procedure and the interests of litigants safeguarded by the rule enunciated by this Court, and followed by the Court of Appeals herein (R. 27), that when a case has been decided on appeal and remanded to the trial court, the latter has no authority, without leave of the appellate tribunal, "to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer". *Re Potts*, 166 U. S. 263, 267.

Because of the far-reaching demoralizing effect which the successful assertion of the Commission's contentions would have, not alone upon applicants for facilities under the Communications Act, but also upon parties who may be subjected to the whims of any administrative agency, a somewhat comprehensive argument is submitted.

B.

ARGUMENT.

Point 1. The Original Decision of the Court Below on the Fundamental Questions of Law Stands Unchallenged.

The petition raises no question concerning the original decision of the Court of Appeals (98 F. (2d) 288) reversing the Federal Communications Commission for errors of law. (R. 1-5.) That decision, dealing with the substantive and fundamental questions involved, has never been the subject of a petition for rehearing or of any other process of review; nor has the Commission ever suggested that it was in any way erroneous. It was made on a complete record which the Commission has never asked leave to supplement or alter. The decision, therefore, stands unchallenged. Yet this is the decision with which the Commission refused to comply, which refusal necessitated a second appeal to the court below, resulting in an order for the issuance of a writ of mandamus to compel obedience.[4] (R. 24, 37.)

The unanimous decision of the court below (April 3, 1939, R. 24), indicating its purpose to issue the writ of mandamus unless the Commission voluntarily complied with the court's first decision (May 9, 1938, R. 1) contained an elaborate and able discussion of the points raised in the oppositions presented both by the Commission and by the Schuylkill Broadcasting Company to the petition for the writs of prohibition and mandamus. (R. 24-29.) Thereafter the Commission filed a petition for rehearing again presenting substantially the same arguments which

[4] Not only is no question raised as to the correctness of the first decision of the court below, or as to any fact stated in that decision, but, significantly enough, the transcript of record submitted to this Court does not include the opinion of the Commission, evidencing the fact that nothing is to be found therein to sustain the validity of the Commission's order of denial despite the statutory requirement that the Commission shall make "a full statement in writing of the facts and grounds for its decision" (R. 29).

are now made to this Court in the petition for a writ of certiorari. After carefully examining the authorities cited and the arguments based thereon the court below in a *per curiam* opinion denied rehearing (R. 33).

Point 2. The Commission Seeks to Nullify the Court's Decision by Indirection.

Instead of reconsidering the one point on which the cause was remanded (as to whether the public interest required it to change to a policy in line with what it did in the instant case, or to adhere to and announce as a general policy for uniform application the practice which it has followed in all other cases both prior and subsequent to its decision herein), the Commission undertook to reopen the case for unrestricted reconsideration, not alone on the record as submitted to the court, but with the addition of another record, not submitted to the court, involving other issues and other parties.

This is the "further action" which the Commission proposed to take and as to which counsel say:

> ". . . We are at a loss to see why the mere prospect of 'further action', sanctioned by this Court, should be thought such a departure from the first judgment of the court below as to warrant mandamus; certainly there is no charge that the Commission will disregard the rulings of the Court of Appeals on the issues which were before that court on the appeal from the Commission's denial of the respondent's application." (Petition, 13.)

It is inconceivable that such "further action" can be regarded as responsive to the court's mandate, or, to use the language quoted by counsel from this Court's opinion in *Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, that it evidenced a purpose on the part of the Commission

"to respect and follow the Court's determination of the questions of law." (Petition, 12-13.)

There was no need or warrant for the further action proposed by the Commission, and unless stopped by the court's order it could lead only to further delay and expense incidental to such proposed hearing before the Commission, the time required for handing down the Commission's decision, and for another appeal to the court. This Court has frequently held that another appeal at the end of long proceedings which must go for naught is not an adequate remedy.[5]

So far from being correct in saying that this Court has sanctioned further action such as that proposed by the Commission in this case, the fact is that this Court has emphatically and uniformly condemned it, as shown by the cases cited in the opinion of the court below. (R. 27.)

If any reasonable ground existed in the public interest for a modification of the judgment below or for reopening the case for the hearing of new parties or newly discovered evidence, such ground must have been known to the Commission long ago, and it was its duty to apply seasonably to the court for such purpose. The failure of the Commission to submit such an application for a hearing *de novo* is to be taken as conclusive evidence that no new matter of a material sort exists. As stated by this Court in *National Brake & Electric Company v. Christensen*, 254 U. S. 430, "such applications are addressed to the sound discretion of the appellate tribunal, and should be decided upon considerations addressed to the materiality of the new matter and diligence in its presentation."

No such application has ever been filed because no "new

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[5] "Where irreparable injury is threatened, or the damage be of such a nature that it cannot be adequately compensated by an action at law, *or is such as, from its continuance, to occasion a constantly recurring grievance*, the party is not ousted of his remedy by injunction." *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 12. (Emphasis supplied.)

matter" could be alleged to exist as affecting the one question sent back for reconsideration. There is no need to suggest that the time has long since passed for any claim of "diligence in its presentation," for the Commission now assumes the arrogant position that it never owed any duty to the court to file such an application under any circumstances.

Thus, the larger question of the substantive right involved in the case cannot and is not sought to be reopened at this stage. The sole question remaining, according to the Commission's contention, is one of procedure. *But if the procedure sought to be followed by the Commission should be sanctioned it would vitiate and render futile the original judgment of the court below which restricted reconsideration to one point.*

It would be a curious result if the Commission should be allowed to ignore the judgment by adopting arbitrary procedure not intended or calculated to carry it out and then to plead by way of estoppel against further judicial control that it possesses "administrative discretion" which lifts it beyond the reach of any process necessary to protect the court's jurisdiction! A complete answer is to be found in the decision of this Court in the *Nelson Bros.* case, *supra*, as follows:

> ". . . The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standard validly set up, whether it acts within the authority conferred or goes beyond it, *whether its proceedings satisfy the pertinent demands of due process*, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, *are appropriate questions for judicial decision.* These are questions of law upon which the court is to pass. . . .
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". . . In this aspect, the questions are . . . (3) whether, *in its procedure*, the Commission denied to the respondents any substantial right." (Emphasis supplied.)

Point 3. What the Court of Appeals Decided.

In its first decision (May 9, 1938) the court below swept aside the primary ground assigned by the Commission as the basis for its refusal to grant the license, as being wholly invalid, stating in this connection, "it is undoubtedly true, as the Commission in effect now concedes, that the validity of the stock subscriptions was in no respect dependent upon any action by the Pennsylvania Commission." (R. 3.) The "incorrect supposition" concerning this was the sole ground assigned by the Commission for its refusal to make the grant on the basis of "financial inability." (R. 3.)

As a sort of "supplemental justification of the rejection" the Commission stated that the president of the applicant corporation had never resided in Pottsville and had no present purpose of residing there, "but failed to find that fact an adequate ground for rejection." (R. 27.) As to this the court observed in its first opinion that the president and principal stockholder—

". . . associated with him and brought into the new corporation a number of the leading citizens of that town in order to effectuate his purpose. . . . All are men of prominence, standing, and character in the community. It is quite true that their interests for the time being are more or less nominal, but Drayton testified that in associating them with himself in the new enterprise he anticipated and hoped that their financial interest would increase with the station's growth and expansion. There is nothing in the record to suggest that they are mere dummy directors. Their own evidence indicates the contrary and at least for

the period of their services as directors they would have the same individual responsibility as Drayton in the conduct of the corporation's business. They at least, if anybody, know the local requirements." (R. 3-4.)

The Court stated that "As applied here, this ground of refusal was obviously secondary rather than primary. It perhaps would not have influenced the Commission to the point of denying the license, except for what the Commission viewed as the lack of financial ability on the part of the applicant." Nevertheless, in deference to the view that this secondary ground involved a question of policy which the statute intended to leave in the hands of the Commission, the case was remanded for reconsideration on that point. (R. 4.)

In its second opinion (April 3, 1939) the court said: "The case, with that question alone open, was remanded to the Commission for reconsideration." (R. 28.)

Point 4. The Commission Refuses to Announce a Rule or Policy Which Will Avoid Discrimination and Favoritism.

Obviously such "reconsideration" was intended to be confined to the one question of policy and was not to be used as a vehicle for bringing in a new case, involving new issues and new parties. But the Commission refused and still refuses to announce a rule or policy for uniform application, such as might be permitted by the decision of the court. In fact, it is apparent that *the Commission is unwilling to bind itself to do in all cases without discrimination what it arbitrarily and capriciously did in this one case to defeat this particular applicant for reasons best known to itself and which it has shown no disposition to disclose.* It is demonstrable—indeed, the fact as alleged

in the petition for writs of prohibition and mandamus is not disputed on this record, that "the Commission has shown that it intends to continue its contrary policy, heretofore announced in numerous decisions, of sanctioning the control of applicant corporations by nonresidents who are not personally familiar with the needs of the area to be served." Decisions are there cited to show that the Commission has continued such contrary policy since its decision herein and even since the decision of the court below (R. 7, 9).

The court, therefore, was justified in saying (R. 29), in its later opinion granting mandamus:

> ". . . But we think it is obvious that the particular objections of the Commission to a reconsideration on the record—to which we have referred—are mere makeweights, and that the real bone of contention is the insistence by the Commission upon absolute authority to decide the rights of applicants for permits without regard to previous findings or decisions made by it or by this court."

The Commission claims that upon the issuance of the court's mandate it set in motion the machinery or procedure to comply therewith but was stopped by the writ of mandamus issued pursuant to the court's second decision, which is the sole occasion for the petition herein.[6] The question is: Did the Commission comply with the court's mandate or judgment, and was it required so to do?

Its petition for certiorari sufficiently evidences the fact

[6] The order, entered May 15, 1939, commanded the Commission "to carry out the judgment of this court, namely, (a) to set aside the order of the Federal Communications Commission dated June 9, 1938, which denied the application of petitioner, Pottsville Broadcasting Company, and designated said application for hearing on a comparative basis with the applications of the Pottsville News and Radio Corporation and of the Schuylkill Broadcasting Company, and (b) to hear and reconsider the application of petitioner, Pottsville Broadcasting Company, on the basis of the record as originally made and in accordance with the opinions of this court in this cause filed on May 9, 1938, and on April 3, 1939" (R. 37).

that the Commission has not complied and does not intend to comply unless this Court upholds the decision of the court below. It cannot be thought that when the court required the Commission to reconsider the one question left open (R. 4) it intended to open wide the door for two other applications, involving another record, other issues and other parties not before the court and who were never eligible to become parties under the Commission's rule,[7] and to permit the Commission in consequence to base its new decision upon facts not properly before it.

If the Commission, in the face of the court's decision, may assign the case for reargument along with two other applications on another record made by other parties, *it would seem to follow logically that the Commission has power then to decide the case without regard to the restrictions imposed by the court's decision;* otherwise such reargument would be a futility—a waste of both time and money. It would simplify matters to bury the Communications Act and appoint a dictator to say who shall and who shall not operate radio stations and how they shall be operated.

Point 5. The Record Is Binding Upon Court and Commission Alike.

The pertinent provision of the statute is quoted in the opinion of the court below. (R. 26.) Since the court having statutory power of review is required to "hear and determine the appeal upon the record before it," how can it be said that the subordinate tribunal, whose decision is being reviewed, is unrestricted, and, after the court has remanded the case on one point for reconsideration, may disregard the mandate and take such procedural steps as it may choose in order to build up a new record, with new

[7] Rule 106.4.—See Note 2, *supra*, p. 2.

parties who are to be allowed "full latitude" (R. 8) to argue anything they please? Does the statute mean one record for the court and then, subsequently, another record or any number of records for the Commission, unrestricted as to time, issues, and parties, and regardless of the fact that "the record" has already been made and considered by the court and the Commission as the basis for their respective decisions?

If the Commission is to be allowed such latitude, what estimate can be made as to when the litigation may terminate, and the public interest begin to be served? In such case will not the litigation last as long as the Commission chooses to disagree with the court? Is this the result intended by the statute in providing that "At the earliest convenient time the court shall hear and determine," and that the court's judgment "shall be final"? Obviously, there can be no finality to the judgment of the court "upon the record before it" if that record can be changed at any time and in any way the Commission chooses without prior leave asked of or granted by the court. Since the statute provides that the court "shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission," and to "remand the case to the Commission to carry out the judgment of the court," is the court powerless, in aid of its jurisdiction, by mandamus or otherwise, to restrain the Commission from taking procedural steps not essential to a reconsideration of the one question left open by the court's mandate but intended to reopen the case for consideration *de novo* and to include other records and other parties?

Point 6. The Appellate Court Has Power and Is in Duty Bound to Protect Its Jurisdiction and Enforce Its Mandate.

The rule repeatedly announced by this Court is that when a case has been decided on appeal and remanded to the trial court, the latter has no authority, without leave of the appellate court, "to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer". *Re Potts*, 166 U. S. 263, restating the rule announced in *Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, and as subsequently affirmed in *D. L. & W. R. Co. v. Rellstab*, 276 U. S. 1. In the case last cited this Court said:

> "Like other appellate courts, the Circuit Court of Appeals has power to require its judgment to be enforced as against any obstruction that the lower court, exceeding its jurisdiction, may interpose. *McClellan v. Carland*, 217 U. S. 268. The issue of a mandamus is closely enough connected with the appellate power."

See, also, *Baltimore & O. R. Co. v. U. S.*, 279 U. S. 781, and *Illinois ex rel. Hunt v. Illinois C. R. Co.*, 184 U. S. 77.

It is asserted that "even if an equity court under comparable circumstances would be powerless to hear new issues, the administrative tribunal is subject to no such limitation." (Petition, 14.)

This claimed exemption of administrative tribunals has never been recognized by this Court in any case and the court below could not do otherwise than reject it. Indeed, there is even greater need for applying the limitations called for by the rule where an administrative agency is concerned for, as this Court observed in *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 52:

> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands.

> Some may be expert and impartial, others subservient."

The argument now advanced for a different rule as applied to an administrative tribunal contains nothing that was not presented to the court below. (Petition, 13-14.) It is as vague as it is dogmatic. The one case (*Ford Motor Co. v. Labor Board*, 305 U. S. 364) cited as authority for the contention does not lend it the slightest support, as was found by the court below after careful examination. (R. 33.) The extracts from the *Ford* decision quoted in the petition (p. 14) were torn from the context in two separate paragraphs in order to fit them to the exigencies of this case and rob them of their real meaning.

We deem it unnecessary to attempt any elaborate discussion of the *Ford Motor Company* case to show that it does not sustain the Commission's contentions in any respect, but we do ask the indulgence of the Court in adverting to it for the purpose of illustrating the complete harmony between that decision and our own contentions.

Counsel concede that "The provisions governing review are substantially similar in the Communications and the National Labor Relations Acts." (Petition, 13.)

As shown by the decision in the *Ford* case, after the decision of this Court in *Morgan v. U. S.*, 304 U. S. 1, the Labor Relations Board, because of faulty procedure, filed a motion for leave to withdraw its petition for enforcement of its order. This motion was granted. Subsequently the court granted another motion of the Board—

> ". . . to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case."

No similar motion has ever been filed in this proceeding

by the Communications Commission for leave to reform or modify its decision and order "upon a reconsideration of the entire case." Naturally, upon such a broad remand in the *Ford* case, "if further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken." There was no such remand in the instant case *but one restricting reconsideration to a single point.* And the statement of this Court in the *Ford* case, that the authority conferred upon the Board to modify or set aside its findings and order "ended with the filing in court of the transcript of record" applies equally to limit the authority of the Communications Commission in the instant case. This is in line with the decisions, beginning with *Sanford Fork & Tool Co., supra,* holding that a subordinate tribunal, without leave of the appellate court, has no authority "to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer," but is bound by the decree as the law of the case and "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded . . ."

In the *Ford* case this Court said:

> ". . . In the circumstances of the present case we think it is clear that the court was possessed of exclusive jurisdiction of the administrative proceeding 'and of the question determined therein,' and thus of the power of 'enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.'"

The Court also observed that—". . . the Board, in the presence of the court's continued and exclusive jurisdic-

tion, remained without authority to deal with its order . . . ".

The decision of this Court in the *Ford* case completely disposes of the contention that an administrative tribunal stands on a different footing from a lower equity court in responding to the remand of a cause; and also of the contention that the remand in the instant case, restricting reconsideration by the Commission to one point, is an encroachment upon administrative functions. For convenient reference we quote in the margin two paragraphs from that opinion which include the fragments appearing at page 14 of the petition for writ of certiorari.[8]

These expressions, read in conjunction with the entire

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8 "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied [cases]. Such a remand *may be* made to permit further evidence to be taken or additional findings to be made upon essential points [cases]. So, when a District Court has not made findings in accordance with our controlling rule (Equity Rule 70½), it is our practice to set aside the decree and remand the cause for further proceedings [cases]. The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and, while the court must act within the bounds of the statute and without intruding upon the administrative province, *it may adjust its relief to the exigencies of the case* in accordance with the equitable principles governing judicial action. The purpose of the judicial review *is consonant with that of the administrative proceeding itself—to secure a just result with a minimum of technical requirements.* The statute with respect to a judicial review of orders of the Labor Relations Board follows closely the statutory provisions in relation to the orders of the Federal Trade Commission, and as to the latter it is well established that the court may remand the cause to the Commission *for further proceedings to the end that valid and essential findings may be made* [cases]. Similar action has been taken under the National Labor Relations Act in Agwilines v. National Labor Relations Bd. (C. C. A. 5th), 87 F. (2nd) 146, 155. See also National Labor Relations Bd. v. Bell Oil & Gas Co. (C. C. A. 5th), 91 F. (2d) 509, 515. *The 'remand' does not encroach upon administrative functions.* It means simply that the case is returned to the administrative body in order that it may take further action *in accordance with the applicable law.* See Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 278.

"Such a remand does not dismiss or terminate the administrative proceeding. *If findings are lacking which may properly be made upon the evidence already received, the court does not require the evidence to be reheard* [cases]. If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken [cases]. Whatever findings or order may subsequently be made will be subject to challenge if not adequately supported or the Board has failed to act in accordance with the statutory requirements." *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373-374. (Emphasis supplied.)

opinion in the *Ford* case, are in harmony with and serve to illustrate the long-established rule announced in *Re Potts* and other cases already cited to the effect that an appellate court has complete jurisdiction to restrict or broaden its remand to an administrative tribunal, as to an inferior court, in any way necessary to meet the exigencies of a particular case, and that such a tribunal has no authority to go one step beyond what is permitted by the remand either procedurally or otherwise.

If any doubt could be entertained as to what this Court meant in the *Ford* case it would be instantly dispelled by the expression in *Morgan v. U. S., supra:*

> "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

In the *Morgan* case on a former appeal (298 U. S. 468) this Court said that the duty of the Secretary of Agriculture to "determine and prescribe" what shall be the just and reasonable rate "is a duty which carries with it fundamental procedural requirements . . . Facts and circumstances must not be considered which should not legally influence the conclusion . . ." Citations to the same effect could be multiplied indefinitely but we ask leave to conclude the discussion under this head with the following:

> ". . . In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to

its action." *Wichita R. & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 59.

Point 7. The Court Below Has Not Attempted to Set Itself Up as a "Revising Agency" on Any Question Committed to the Commission's Discretion.

It is asserted that the court below has attempted to set itself up as "a superior and 'revising agency' in the administrative field." (Petition, 11-12.)

The fact is that at no stage of the proceeding has the court undertaken to revise the Commission's decision. What it did in its first decision, which, as already shown, the Commission has never claimed to be erroneous, was to reverse the Commission on the primary ground constituting the real basis for its decision. This was the "incorrect supposition" that the consent of the Pennsylvania Securities Commission was essential to the validity of the proposed stock issue by a Maryland corporation organized to engage in interstate commerce. This was the sole basis for the Commission's refusal to make the grant "on the basis of financial inability." And as the court stated in its opinion, "the Commission in effect now concedes that the validity of the stock subscriptions was in no respect dependent upon any action by the Pennsylvania Commission." (R. 3.)

As to the other ground of refusal, which the court said "was obviously secondary rather than primary," and which "perhaps would not have influenced the Commission to the point of denying the license, except for what the Commission viewed as the lack of financial ability on the part of the applicant," the court showed extraordinary caution and, if anything, leaned backward in refusing to set itself up as a "revising agency" in the administrative field. It said (R. 4):

"'. . . we think the interests of justice require

that the case be sent back to the Commission solely that it may reconsider it."

And to make its position perfectly clear the court added:

> "If the Commission should be of opinion, upon reconsideration, that the application ought not to be granted because a stranger to Pottsville has the controlling financial interest in the applicant corporation, and should announce a policy with relation to the grant of local station licenses, confining them to local people, we should not suggest the substitution of another view. But in saying this we are not unmindful of the obvious fact that such a rule might seriously hamper the development of backward and outlying areas." (R. 4.)

Even subsequent to its first decision, when the Commission had plainly indicated a continuing attitude of obdurate contumacy and so made it necessary for respondent to file a petition for writs of prohibition and mandamus, the court did not undertake to determine *how* the question of policy should be determined, *but only that the Commission should decide it one way or the other.* No court could or should have exhibited more patience and self-restraint.

The Commission had construed and acted on its own rule (Rule 106.4, now Sec. 12.21 of the Commission's Rules of Practice and Procedure) as constituting a bar to contemporaneous hearing of applications filed after the first application had been designated for hearing. The new or changed policy which the Commission was given leave to announce was intended to apply only to "local" stations and therefore could not in any event affect this application, which was for a "regional" station as defined by the Commission's rules. The unwisdom of such a policy, even as applied to local stations, was emphasized by the court and tacitly recognized by the Commission in consistently following a contrary practice in all other cases

and in refusing to prescribe such a policy for uniform application when this case was remanded. In view of these facts we respectfully submit that, instead of merely requiring the Commission by mandamus "to hear and reconsider the application of petitioner, The Pottsville Broadcasting Company, on the basis of the record as originally made and in accordance with the opinions of this Court in this cause filed on May 9, 1938, and on April 3, 1939" (R. 33), *the court below had power and properly should have required the Commission to grant the application, the need for the station and the legal and technical qualifications of the petitioner having been recognized and found by the Commission, and the court having held that the Commission committed an error of law in finding that petitioner was not financially qualified.*

Without such relief respondent has suffered and will continue to suffer irreparable injury by reason of protracted and expensive litigation, and the public in the Pottsville area, already denied radio facilities during the more than three years that this application has been pending, will be subjected to further incalculable delay should the Commission be permitted to reopen the case for another hearing on a different record.

Under the procedure contemplated by the Commission, this respondent may be required to appeal again and again to the court until the Commission has exhausted reasons which it might give for denying an application, or until it has heard an endless chain of other applications, subsequently filed, in its pretended search for the "Best". Certainly any "final relief" under such a procedure may be so far beyond the reach of the average applicant as to be no relief at all.

This Court has stated that the mere fact that there is a remedy at law is not enough; that remedy "must be as practical and efficient to the ends of Justice and its prompt

administration as the remedy in equity." *Boyce's Executors v. Grundy*, 5 Pet. 210, 215. And again:

> "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances." *Kilbourn v. Sunderland*, 130 U. S. 505, 514, affirmed in *City of Walla Walla v. Walla Walla Water Co.*, *supra*.

Point 8. There Are No "Conflicting Applications" Now Entitled to Consideration.

The petition refers to "the choice between conflicting applications" which counsel assert is committed to the decision of the Commission by the statute and the decisions of this Court. (Petition, p. 12.)

The Commission did not deny this application because it had before it conflicting applications, one of which it considered "best" in the public interest to grant. The two applications now alleged to be conflicting were not filed in time to be heard contemporaneously and on a "comparative basis" under the Commission's Rule No. 106.4, *supra*, which provides, in general, for the consideration of conflicting applications at the same time "so far as practicable," but specifically excepts applications filed after the first application has been "designated for hearing." (R. 20-21; Note 2, supra, p. 2.)

The rule, with the exception as an integral part thereof, was duly promulgated pursuant to the Communications Act and so had the force and effect of law. *Maryland Casualty Company v. U. S.*, 251 U. S. 342, 349. The Commission apparently recognized the exception to the rule as binding when it disregarded the request of the Schuylkill Broadcasting Company to hear its application with that of The Pottsville Broadcasting Company. The latter was designated for hearing six weeks before the former was

filed, and it was actually filed more than six weeks before it was designated. It was therefore excepted from the operation of the rule. (R. 21.) It is hardly necessary to argue that such an exception is clearly in the interest of orderly procedure since, without it, the Commission might become involved with an endless procession of applications, each one of which would delay consideration of that which preceded it, thereby interminably delaying service which would be in the public interest.

The court below did not initiate a preference for the earlier applicant in this case; such preference was derived from the Commission's own rule and its construction and application thereof, which, however, it now seeks to repudiate in order to evade the ruling of the Court of Appeals and to suit its own whimsy.

In the light of these considerations the Commission was not impartially and honestly representing "the interest of the public" in reopening the proceedings for further argument on another record and with new parties, and the "desirability" of so doing was not a matter "peculiarly administrative" in its nature. It was capricious and arbitrary, a flagrant abuse of discretion, and, therefore, unlawful.

Under the circumstances it can scarcely be regarded as fair or legitimate argument for counsel to charge the court below with "subordinating the interests of the public in the administration of the Communications Act of 1934 to the private interest of a particular applicant . . ." (See Petition, p. 8.)

Point 9. The Commission Has Not Been Constituted the Sole Guardian of the Public Interest.

It is claimed that it is "the Commission's statutory duty to represent the interest of the public" (Petition, 13): and that "The choice between conflicting applications, the

preference that as a general rule should be given the earlier applicant, and the desirability of reopening proceedings for further evidence, are matters peculiarly administrative in their nature." It is, therefore, asserted that "The statute and the decisions of this Court commit their decision to the Commission, not to the court below." (Petition, 12.)

We think this argument has already been sufficiently answered. It may not be amiss, however, to call attention to the fact that the court below is also charged with a statutory duty, as well as an inherent judicial duty to concern itself with the interest of the public, and that the extent to which it "may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved." *United States v. Morgan*, 307 U. S. 183.

Presumably the public interest is best served by consistent, nondiscriminatory and impartial administration of an Act of Congress. Certainly that is to be understood as the intent of Congress. This is not the first commission or board which has been irked by judicial restraint, or the first that has contended that it was so wise in the sphere of its own activities, so sanctified in its devotion to the public interest, its functions so overwhelmingly important and complex, and so necessary to be exercised in a peculiar way, that the public interest could not be properly served if there were the slightest interference by the courts with its administrative discretion. These pretensions have never been sanctioned by this Court; and yet in this case they have been put forward with unbounded truculence, as witness the following statement made in the petition for rehearing submitted by the Communications Commission to the court below:

> "It can no more be the function of this Court, acting as a judicial tribunal, to control the procedure of the

> Federal Communications Commission, an administrative body, than it can be the function of the Communications Commission to control the procedure of this Court."

A multitude of citations could be given in answer; one will suffice:

> "In granting licenses the Commission is required to act 'as public convenience, interest or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power . . ." *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Company*, 289 U. S. 266.

Under our constitutional system of government no one set of men is clothed with absolute power to determine what is "best" in the public interest. Ambitious men, grasping for power, in all ages have claimed to be actuated by the purest motives. In this case the Communications Commission pretends that the public interest requires it to place one applicant in a special class by denying its application for a reason running counter to the policy or practice followed in all other cases and then claims that such arbitrary and capricious action is not reviewable. "Rights under our system of law and procedure do not rest in the discretionary authority of any officer, judicial or otherwise." *Re Hollon Parker*, 131 U. S. 221.

Congress vested the United States Court of Appeals for the District of Columbia with power to review decisions of the Communications Commission in order to insure against just such abuses. As this Court said in *United States v. Morgan, supra:*

> ". . . Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words

should be construed so as to attain that end through co-ordinated action . . . neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim."

It makes no difference whether the abuse of power is accomplished by a decision which directly does violence to some right inhering under the law, or is accomplished indirectly through the improper exercise of functions claimed to be "peculiarly administrative," such as the repeated assignment of a case for argument or reargument when there is no need, occasion or warrant for it. Protracting and prolonging litigation unnecessarily has long been recognized as a public evil.

Point 10. The Proposed Action of the Commission Would Not Serve the Best Interest of the Public.

It is contended that "Section 319 (a) requires the Commission not only to determine if a given application is in the public interest, but which of the competing applications will *best* serve the public interest." (Petition, 15.) The language of the statute is: "The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station." But conceding that the Commission must determine which of the "competing applications" will *best* serve the public interest, surely the element of time enters into the equation. Horses do not compete unless they run in the same race on the same day. And one application is not "competing" when it is filed so long after another that the Commission's own rule, as applied by the Commission itself in this case, denies it the right to contemporaneous hearing. The Commission only seeks to repudiate that rule after the court below has recognized its force and effect

by giving it the same construction as did the Commission in refusing the request of the Schuylkill Broadcasting Company (the earliest of the so-called competing applicants) to have its application heard on the same date as that fixed for the Pottsville Broadcasting Company. (R. 14.)

The case, having taken this course under the Commission's rule, was decided by the Commission *on the record so made.* There was no "competing" application then and none when the record was taken up for consideration by the court below. *How can it be said that the reversal by the Court of Appeals because of the Commission's errors of law opened up the case for competing applications theretofore barred by the Commission itself?* The Court of Appeals was right in saying (R. 29):

> ". . . In such a case petitioner ought not now to be put in any worse position than it occupied on the original hearing, and therefore ought not to be required any more now than originally to be put in hodgepodge with later applicants whose records were not made at the time of the previous hearing."

If the Commission, in any case it may choose, is to be permitted to deny a given application on insufficient or false grounds, and, when those grounds are invalidated by the court having statutory power of review, to set up other excuses for such denial, e. g., a vague surmise that another trial or hearing *might* disclose that a subsequently filed application *might* "best" serve the public interest, and if to accomplish its purpose it may waive the time element established by its own rule and applied in the first instance by itself and later given force and effect by the court, then indeed is the standard so indefinite as to confer unlimited power.

The best is seldom attainable. In the long run it is inconceivable that the best interest of the public will be

served by committing that interest to the undisciplined discretion of a tribunal which has so plainly evidenced a disposition to rule by fiat rather than under the law.

CONCLUSION.

This case involves no novel principle of law requiring clarification or further exposition by this Court. The reports are full of such cases where the courts have been compelled to intervene and take action precisely like that taken by the court below.

It may be true, as urged in the petition, that the decision below is one of some gravity "so far as it bears on the administration of the Communications Act," but not because it invades any exclusive province of the Communications Commission. It is important because it seeks to curb the unbridled license of a tribunal which seems to regard the Act of Congress as its personal property, to administer exactly as its fancy prompts, and which resents the effort of the court to require it to stay within the law. It raises no "disturbing possibilities" for administrative agencies not ambitious to indulge their own peculiar theories of personal government.

The Federal Communications Act, according to the language used in Title I thereof, was intended to be administered "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication," etc. 48 Stat. 1064, 47 U. S. C. § 151.

The application of the Pottsville Broadcasting Company was filed with the Communications Commission more than three years ago—May 19, 1936. The Commission has

interposed every possible obstacle to the establishment of radio communication service in the Pottsville area despite the fact that in its decision it said there existed a need for this service and could find no grounds for a denial of this application other than those which the court pronounced arbitrary and capricious.

During this long-drawn-out litigation a World War has supervened. It may be that eventually our country will be involved. In that case who can say that radio communication service in the Pottsville area may not be an important link "for the purpose of national defense"? At least such a contingency seems to have been in contemplation of Congress in enacting this legislation.

If the Commission be allowed such latitude as will result in capricious and arbitrary administration of the Communications Act, ultimately it must lead to complete demoralization so that political considerations more and more will control. And if political considerations control the granting of licenses, they will ultimately control the policies of the broadcasting stations set up under such licenses subject to periodical renewals.

"Freedom of the press" has long been recognized not merely as a cherished tradition of the American people, but as being essential to the preservation of our liberties. No regulation or censorship of the press has ever been attempted, nor would it be tolerated by the people. Freedom of the radio from political interference or domination is equally important; and since this modern method of communication and public discussion is necessarily subject to the regulation of the Federal government, it is vital that such regulation be honest and impartial, free from all political considerations, and, like Caesar's wife, above suspicion. Enslavement of the press would almost certainly follow bureaucratic or political domination of radio broadcasting. Congress was alive to this danger when it

explicitly vested power in the United States Court of Appeals for the District of Columbia to review the Commission's orders.

It having been demonstrated, as we respectfully submit, that the decisions of the court below were right and just, and that that court had jurisdiction under its inherent judicial powers and under explicit authority vested by the Communications Act, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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